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No. 01-301

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The Ninth Circuit in *Saffold v. Newland*, 250 F3d 1262 (9th Cir. 2001) has interpreted AEDPA's statute of limitations tolling provision, 28 U.S.C. § 2254(d)(2), to permit a delay of over four and a half months between state court filings despite a state supreme court ruling dismissing the state habeas corpus petition for "lack of diligence." One federal district court has relied upon *Saffold* to toll a delay of 15 months between state court filings. *Saffold's* interpretation of § 2254(d)(2) is in direct conflict with *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), which concluded that *Saffold's* "understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect."

QUESTION PRESENTED

Whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. section 2244(d)(2), the Antiterrorism and Effective Death Penalty Act's tolling provision.

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

ANTHONY NEWLAND, *Petitioner,*

v.

TONY EUGENE SAFFOLD, *Respondent.*

_____

OPINION BELOW[1/]

Petitioner respectfully petitions for a writ of certiorari to review the May 23, 2001, order and opinion of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001) (No.99-15541) (hereafter "*Saffold*") (Appendix A), which amended and superceded the Ninth Circuit's July 17, 2000, opinion reported at 224 F.3d 1087 (9th Cir. 2000) (Appendix B) and reversed the judgment of the United States District Court for the Eastern District of California that dismissed Respondent's application for a writ of habeas corpus. Respondent is a prisoner in state custody pursuant to a judgment of conviction in the Superior Court of the State of California for first degree murder, assault with a firearm, and robbery.

Petitioner has included the following orders and opinions as Appendices: (A) the Ninth Circuit's May 23, 2001,

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

Saffold order and opinion; (B) the Ninth Circuit's July 17, 2000, superceded *Saffold* opinion; (C) the Ninth Circuit's June 4, 2001, order granting Petitioner's motion for stay of mandate; (D) United States District Court Judge David F. Levi's February 25, 1999, order granting a certificate of appealability limited to the issue of whether Saffold's "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)"; (E) United States District Court Judge David F. Levi's January 6, 1999, order adopting the Findings and Recommendations of the magistrate judge in full and dismissing Respondent's application for writ of habeas corpus; (F) United States Magistrate Judge John F. Moulds's November 3, 1998, Findings and Recommendations that the application for writ of habeas corpus be dismissed; and (G) the California Supreme Court's May 27, 1998, denial of Respondent's petition for writ of habeas corpus.

STATEMENT OF JURISDICTION

On May 23, 2001, the Ninth Circuit entered its judgment in *Saffold* and denied rehearing and rehearing en banc. (Appendix A.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States to resolve the conflict between *Saffold* and *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000) and to settle an important question of federal law.

THE STATUTE INVOLVED IN THE CASE

28 U.S.C. § 2244(d) sets forth the following one-year statute of limitations period and tolling provision for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the non-capital judgment of a state court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

On April 3, 1990, Respondent was found guilty in California state court of murder, assault with a deadly weapon, two counts of robbery, and findings of firearm use associated with the murder and robberies. His conviction became final on April 20, 1992.

On April 17, 1997, seven days before the

Antiterrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations would have expired,[2/] Respondent filed his first state petition for writ of habeas corpus with the San Joaquin County Superior Court by delivering the petition to prison authorities.[3/] The petition was denied by the San Joaquin County Superior Court on June 9, 1997.

On June 14, 1997, Respondent delivered a petition for writ of habeas corpus to prison authorities to be filed with the California Court of Appeal, Third Appellate District. The petition was filed on June 17, 1997, and denied by the Third Appellate District on June 26, 1997.

On November 13, 1997, after waiting over four and one-half months, Respondent filed a petition for writ of habeas corpus with the California Supreme Court, which denied the petition on May 27, 1998, "on the merits and for lack of diligence." (Appendix G.)

On June 4, 1998, Respondent filed an application for writ of habeas corpus in the United States District Court, Eastern District of California (Sacramento). The district court's jurisdiction was conferred by 28 U.S.C. § 2254.

On August 28, 1998, Petitioner filed a motion to dismiss on the ground that Respondent's application for writ of habeas corpus was barred by the statute of limitations set forth in 28 U.S.C. § 2244(d).

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2. In *Patterson v. Stewart*, 251 F.3d 1243, 1245-1246 (9th Cir. 2001), the Ninth Circuit recently joined all other circuits which have considered the issue and held that "AEDPA's one-year grace period for challenging convictions finalized before AEDPA's enactment date is governed by Rule 6(a) and ended on April 24, 1997 in the absence of statutory tolling."

3. Petitioner does not contest *Saffold*'s holding that the mailbox rule set forth by this Court in *Houston v. Lack*, 487 U.S. 266, 276 (1988), applies to habeas petitions filed under the AEDPA and applies, "for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling." *Saffold*, 250 F.3d at 1268.

On November 3, 1998, the magistrate judge filed his findings and recommendations that Petitioner's motion to dismiss be granted and that the case be closed. (Appendix F.)

On January 6, 1999, the district court adopted the findings and recommendations in full, granted Petitioner's motion to dismiss and ordered the case dismissed. (Appendix E.)

On February 25, 1999, the district court granted a certificate of appealability limited to the issue of whether Respondent's "application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1)." (Appendix D.)

On July 17, 2000, the Ninth Circuit filed *Saffold v. Newland*, 224 F.3d 1087 (9th Cir. 2000) reversing the district court's dismissal of the case. (Appendix B.)

On July 31, 2000, Petitioner filed a petition for rehearing and suggestion for rehearing en banc.

On May 23, 2001, the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc, and filed *Saffold v. Newland*, 250 F.3d 1262 (9th Cir. 2001), which amended and superceded the July 17, 2000, opinion. (Appendix A.)

On June 4, 2001, the Ninth Circuit filed an order granting Petitioner's motion for stay of mandate. (Appendix C.)

ARGUMENT

THE NINTH CIRCUIT HAS IMPROPERLY INTERPRETED AEDPA'S STATUTE OF LIMITATIONS TOLLING PROVISION IN A MANNER THAT IS INCONSISTENT WITH CONGRESSIONAL INTENT, THEREBY CREATING A CIRCUIT CONFLICT WHICH THIS COURT SHOULD RESOLVE

Five years after his state court direct appeal became final, and seven days before the one-year AEDPA statute of limitations period expired, Respondent filed his first state habeas corpus petition in superior court (alleging ineffective assistance of counsel). Five days after the superior court denied his petition on the merits, Respondent filed the identical petition with the state appellate court by delivering the petition to prison authorities. Following a summary denial of the petition by the state appellate court, Respondent waited over four and a half months before he filed his ineffective assistance claim with the California Supreme Court, which denied the petition "on the merits and for lack of diligence."

After Respondent's federal application for writ of habeas corpus was dismissed as untimely under AEDPA's statute of limitations, the Ninth Circuit reversed the district court and held that, when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness alternatively addresses the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the California Supreme Court's denial of the habeas petition, including gaps between the filing of the petitions. Appendix A at 8-13; *Saffold*, 250 F.3d at 1265-1268; Appendix B at 6-10; *Saffold*, 224 F.3d at 1088-1091.

Judge O'Scannlain's dissenting opinion in *Saffold* argued that, "[i]n a case involving such dilatory behavior as this, . . . the clock must continue to run in the periods of excessive delay between the three separate habeas petitions." Appendix A at 15; *Saffold*, 250 F.3d at 1269; Appendix B at 12-13; *Saffold*, 224 F.3d at 1091-1092. Judge O'Scannlain explained that:

> Under any method of review, Saffold's delay falls substantially outside the period that *Nino*[4] tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

Appendix A at 17; *Saffold*, 250 F.3d at 1270; Appendix B at 14; *Saffold*, 224 F.3d at 1092.

Although the *Nino* court held "that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge" (*id.* at 1006), the *Nino*

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4. *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999).

court qualified the holding by concluding "that, for purposes of § 2244(d), the time must be tolled for the entire period in which a petitioner is **appropriately pursuing** and exhausting his state remedies." *Id.* at 1004, emphasis added. The *Nino* court explained that:

> Because the statute of limitations was tolled during the period in which Nino was **properly pursuing** his state post-conviction remedies, the district court erred in dismissing Nino's federal habeas petition as untimely. . . . On March 11, 1997, the Los Angeles Superior Court denied Nino's first petition. On April 23, 1997, he filed a habeas petition in the California Court of Appeals [sic]; that petition was denied on May 1, 1997. On May 20, 1997, he filed a petition with the California Supreme Court, which was denied on August 27, 1997. Because he was **properly pursuing** his state collateral remedies,[FN4] AEDPA's statute of limitations was tolled until the California Supreme Court denied his petition for review of the court of appeals' [sic] denial of his habeas petition.

Id. at 1006-1007, emphasis added. In footnote 4, the *Nino* court noted that:

> [W]e express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims. *See In re Robbins*, 959 P.2d 311, 317-18 (Cal.1998); *In re Clark*, 855 P.2d 729, 745 (Cal.1993) . . . .

Nino at 1006, fn. 4.

By eviscerating footnote 4 of *Nino* (thereby

eliminating *Nino's* requirement that a petitioner be "**appropriately pursuing** and exhausting his state remedies" in order to be allowed tolling under AEDPA), the majority opinion in *Saffold* has improperly diluted the statute of limitations imposed by Congress by interpreting AEDPA's tolling provision in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d 799, 807 (10th Cir. 2000); *Melancon v. Kaylo*, No. 00-30439, ____ F.3d ____, 2001 WL 822453, at *4 (5th Cir. Aug. 6, 2001). In short, the *Saffold* opinion allows tolling for any length of time despite a petitioner's dilatory behavior and a state court rejection of the petition on the ground of delay as long as the state court also addresses the merits of the claim. Appendix A at 11-13; *Saffold*, 250 F.3d at 1267-1268; Appendix B at 9-10; *Saffold*, 224 F.3d at 1090.

Citing *Saffold*, a recent federal district court decision has permitted tolling during a 15-month gap between the inmate's original and successive state habeas petition. *Romero v. Roe*, 130 F.Supp.2d 1148, 1149-1151 (C.D. Cal. 2001). *Saffold*'s expansion of tolling to include such lengthy dilatory behavior has resulted in a circuit conflict between the Ninth Circuit and the Fifth, Seventh and Tenth Circuits over the important question of whether the time during which a petitioner has failed to properly pursue his state collateral remedies falls within the meaning of "pending" set forth by 28 U.S.C. section 2244(d)(2), the AEDPA's tolling provision.[5]

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5. The resolution of this issue is a matter of federal law. In *Gibson v. Klinger*, the Tenth Circuit stated that:

> Although we look to state law to determine whether an application is "properly filed," we apply our own definition of "pending," which we interpreted in *Barnett* [*v. Lemaster*, 167 F.3d 1321 (10th Cir. 1999)] as a matter of federal law. *Id.*; *see also Mills v. Norris*, 187 F.3d 881, 883 (8th Cir. 1999) (holding the term "pending" is a matter

A. Certiorari Should Be Granted To Resolve The Circuit Conflict Created By *Saffold* And To Settle An Important Question Of Federal Law

The majority opinion in *Saffold* has been severely criticized by and is in direct conflict with the Seventh Circuit's opinion in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000). Judge Easterbrook explained in *Fernandez* that:

> The ninth circuit did not explain [in *Saffold*] how time during which no collateral attack is pending in state court may be deemed time "during which a

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of federal law).

Although the interpretation of the term "pending" is a matter of federal law, our definition does require some inquiry into relevant state procedural laws: under *Barnett*'s definition of "pending," we must ask whether a petitioner was properly employing "state court procedures" in attempting to exhaust state court remedies. 167 F.3d at 1323.

Gibson v. Klinger at 806.

In California, the supreme court, intermediate courts of appeal and superior courts all have original habeas corpus jurisdiction. *See*, *Nino*, 183 F.3d at 1006, fn.2. Although a superior court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the court of appeal. *Id.* If the court of appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review filed within 10 days. *Id.* at 1006, fn.3. Although petitions for review are "strongly preferred," a petitioner may instead file an original habeas petition in the California Supreme Court. *Id.* However, under California's "general rule regarding timeliness," a "habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th 813, 828, fn.7 (1993). Moreover, claims of ineffective assistance of counsel "should be filed in conjunction with the direct appeal" as a verified petition for habeas corpus. *Id.*, citing *People v. Pope*, 23 Cal.3d 412, 426-427, fn. 17 (1979).

> properly filed application for State . . . collateral review . . . is pending"; *Saffold* does not analyze the language of § 2244(d)(2) . . . . All the majority said for itself is that *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), supported its conclusion. But *Nino* presents a different issue: is time following an appellate court's decision, and preceding a timely application for discretionary review, excluded from the calculation under § 2244(d)(2)? *Nino*'s affirmative answer, with which we agree [citations omitted], does not establish that an untimely request receives the same treatment. It is sensible to say that a petition continues to be "pending" during the period between one court's decision and a timely request for further review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be "pending" after the time for further review has expired without action to continue the litigation. That a request may be resuscitated does not mean that it was "pending" in the interim. Under the majority's approach in *Saffold*, if a prisoner let ten years pass before seeking a discretionary writ from the state's highest court, that entire period would be excluded under § 2244(d)(2) as long as the state court denied the belated request on the merits. That implausible understanding of § 2244(d)(2) would sap the federal statute of limitations of much of its effect.
>
> *Saffold*'s approach also would give § 2244(d)(2) a Cheshire-cat like quality, both there and not there at the same time. . . . *Saffold* implements a make-believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing. We prefer reality. An untimely petition is just that; it is filed when it is filed, and it was not "pending" long before its filing. We decline to follow *Saffold*. (Because this decision creates a conflict

among the circuits, it was circulated before release to all judges in active service. See Circuit Rule 40(e). No judge requested a hearing en banc.)

227 F.3d at 980-981; *accord*, *Melancon v. Kaylo*, 2001 WL 822453 at *4 [rejecting *Saffold* and agreeing with the concern expressed by the Seventh and Tenth Circuits in *Fernandez* and *Gibson* "over the potential for indefinite tolling."].

Saffold merits review by this Court on a petition for writ of certiorari under Rule 10(a) of the United States Supreme Court Rules because *Saffold* is in direct conflict with the Seventh Circuit's *Fernandez* opinion as well as the Fifth Circuit's *Melancon* opinion and the Tenth Circuit's *Gibson* opinion. Rule 10(a) provides that among the cases which this Court will consider for review on certiorari are cases where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [or] has decided an important federal question in a way that conflicts with a decision by a state court of last resort . . . ." Petitioner requests that this Court grant certiorari in order to resolve the conflict between the Ninth Circuit and the Fifth, Seventh and Tenth Circuits.

Saffold also merits review by this Court on a petition for writ of certiorari under Rule 10(c) of the United States Supreme Court Rules, which provides that among the cases which this Court will consider for review on certiorari are cases where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Petitioner requests that this Court grant certiorari because the determination of whether the time during which a petitioner failed to properly pursue his state collateral remedies falls within the meaning of "pending," set forth by 28 U.S.C. section 2244(d)(2), is an issue of substantial importance to the states and to prisoners filing petitions for habeas corpus relief. Uniform application of the statute of limitations cannot be reached until this Court addresses the

issue.

B. <u>Certiorari Should Be Granted To Prevent The Ninth Circuit From Diluting Congress's Power To Define The "Proper Scope of the Writ" Of Habeas Corpus</u>

In *Felker v. Turpin*, 518 U.S. 651, 662 (1996), this Court recognized that several sections of AEDPA "impose new requirements" for granting habeas corpus relief under 28 U.S.C. section 2254. *Felker* reiterated that:

> [W]e have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75, 94, 2 L.Ed. 554 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 1298, 134 L.Ed.2d 440 (1996).

518 U.S. at 664; *cf. Sumner v. Mata*, 449 U.S. 539, 548, fn. 2 (1981) [recognizing this Court's duty to ensure that the federal courts do not exceed their jurisdiction and stating that "the 1966 amendments embodied in section 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction"].

The majority opinion in *Saffold* has improperly diluted Congress's power to define the proper scope of the writ of habeas corpus by interpreting AEDPA'S tolling provision, 28 U.S.C. § 2244(d)(2), in a way that is inconsistent with "Congress's intent to encourage exhaustion of state court remedies without allowing prisoners to toll the limitations period indefinitely." *Gibson v. Klinger*, 232 F.3d at 807; *Melancon v. Kaylo*, 2001 WL 822453 at *4. Consequently, Petitioner respectfully requests that this Court grant certiorari to ensure that Congress's intent is not thwarted.

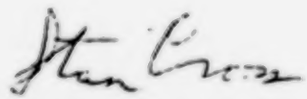
CONCLUSION

The correct interpretation of "pending" for statute of limitations purposes is an issue of substantial importance to the states and to prisoners filing petitions for habeas corpus relief. *Saffold's* interpretation of AEDPA's tolling provision has effectively eviscerated AEDPA's statute of limitations and has created a circuit conflict which this Court should resolve. For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: August 15, 2001

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, Petitioner-Appellant,	)	No. 99-15541
	)	D.C. No.
v.	)	CV-98-01040-DFL
ANTHONY NEWLAND Respondent-Appellee.	)	**ORDER AMENDING OPINION AND DISSENT**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
February 14, 2000--San Francisco, California

Filed July 17, 2000
Amended May 23, 2001

Before: Betty B. Fletcher, William C. Canby, Jr., and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Canby;
Dissent by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness at least partially addresses the merits, time should be tolled for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations.

Tony Saffold was found guilty in California state court of murder, assault with a firearm, and robbery. His conviction became final on April 20, 1992.

AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled.

AEDPA's tolling provision states that the time during which a properly filed application for State post-conviction or other collateral review is pending shall not be counted toward any period of limitation.

Saffold filed his state habeas application in state superior court by delivering the petition to prison authorities on April 17, 1997 – six days before the AEDPA one-year limitation would have expired.

The court denied Saffold's state habeas petition on June 9, 1997. On June 14, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26. Saffold then waited four and one-half months before he filed an original habeas petition in the California Supreme Court, on November 13. The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court, ruling that the AEDPA limitation was tolled only while each state court had the petition under consideration, excluded the four days from the superior court's denial of Saffold's petition to his petition to the state court of appeal by delivery to prison authorities, and the four and one-half months between the denial by the court of appeal and Saffold's petition to the California Supreme Court. By this calculation, Saffold's federal petition was filed nearly five months over the one-year limitation.

Saffold appealed.

[1] The district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, the Ninth Circuit decided in another case how the tolling period for exhaustion of state remedies is to be determined. The Ninth Circuit held that the AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Applying these principles to California's post-conviction procedure, the Ninth Circuit held that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

[2] The California Supreme Court addressed the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. Tolling AEDPA's statue of limitations until the state has fully completed its review reinforces comity and respect between judicial systems.

[3] Even if giving separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied for lack of diligence, time should have remained tolled because the dismissal for untimeliness at least partially addressed the merits. [4] The California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.

[5] Habeas corpus petitions filed under AEDPA are deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. [6] On remand, the district court would have to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time.

Judge O'Scannlain dissented, writing that the clock should have continued to run in the periods of Saffold's excessive delay between the three habeas petitions.

COUNSEL

Mary Katherine McComb, Davis, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

ORDER

The majority opinion of this court and Judge O'Scannlain's dissent therefrom, filed on July 17, 2000, slip op. at 8271, reported at 224 F.3d 1087, are hereby amended as follows:

Majority opinion: Insert new footnote 6, to be indicated at the end of the first sentence of the last paragraph on slip op. at 8278 (ending "'Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence.'"). The new footnote shall state:

> The dissent quotes selectively from these words, *infra.* The fact remains, however, that the California Supreme Court denied Saffold's petition both "*on the merits* and for lack of diligence."

Majority opinion: Insert new footnote 8, to be indicated at the end of the first sentence of the first full paragraph on slip op. at 8280 (ending " . . . June 17, 1997"). The new footnote shall state:

> The dissenting opinion, in its footnote 1, refers to the rule adopted in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999), *aff'd*, 121 S. Ct. 361 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. We have no quarrel with this formulation, but disagree with the dissent that review was "unavailable" to Saffold at the time he filed his original habeas petition in the California Supreme Court. The California Supreme Court, in denying that petition, ruled on its merits. In light of that fact, it is impossible for us to conclude that review was "unavailable" in that court. Moreover, the alternative

> ruling denying the petition for lack of diligence was "'a condition for obtaining relief,'" necessarily ruled upon by the court, not a "'condition to filing.'" *Dictado v. Ducharme*, _____ F.3d _____, _____, 2001 WL 203252 at *3 (9th Cir. Mar. 28, 2001) (quoting *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000)). Such procedural bars to the obtaining of relief do not prevent a petition from being "properly filed," *see id.*, and review from therefore being "available" even if unsuccessful.

The remaining footnotes in the majority opinion shall be renumbered accordingly.

Dissenting opinion: The dissenting opinion is amended by deleting the previous dissenting opinion and substituting in full the attached amended dissenting opinion.

With these amendments, Judges B. Fletcher and Canby have voted to deny the petition for panel rehearing, and have recommended denial of en banc rehearing. Judge O'Scannlain has voted to grant panel rehearing and en banc rehearing.

The petition for rehearing en banc and the above amendments have been circulated to the full court. An active judge requested a vote on the petition for rehearing en banc. A vote was taken and the petition failed to receive the affirmative vote of a majority of the active judges of the court. The petition for panel rehearing and for en banc rehearing is DENIED.

OPINION

CANBY, Circuit Judge:

Tony Eugene Saffold is a state prisoner appealing the

district court's dismissal of his federal petition for habeas corpus. The district court concluded that Saffold had failed to satisfy the one-year statute of limitations for a state prisoner filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Whether or not Saffold's petition is barred by the statute of limitations turns in part on a calculation of the period during which the federal statute was tolled while Saffold's petitions for state habeas relief were "pending" in the California courts. *See* 28 U.S.C. § 2244(d)(2). After the district court issued its order, we decided in another case how the tolling period for exhaustion of state remedies is to be determined. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). We now apply *Nino* and conclude that the district court erred by failing to toll the federal statute of limitations for the entire period during which Saffold pursued state habeas relief.

We also conclude that the "mailbox" rule for pro se prisoners applies to Saffold's petitions to the California court and the federal court for purposes of calculating tolling time under AEDPA. Whether and when Saffold delivered his petitions to prison authorities is unresolved. We therefore reverse the judgment of the district court and remand for further proceedings.

THE STATUTE OF LIMITATIONS

In 1990, Saffold was found guilty in California state court of murder, assault with a firearm, and two counts of robbery. He appealed, and his conviction became final on direct review on April 20, 1992.

Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners

filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).[1]

AEDPA's tolling provision states that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2).

Saffold contends that he got in under the wire by filing his state habeas application in the Superior Court of San Joaquin County by delivering the petition to prison authorities on April 17, 1997--just six days before the AEDPA one-year limitation would have expired. The district court accepted that contention for purposes of decision and, in order to review the district court's ruling, we accept it as well.

The issue for our decision is how much of the time after April 17, 1997, was tolled for purposes of AEDPA.[2] We conclude that Saffold had a state collateral proceeding "pending" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), during the entire period from the time he filed his state petition in the trial court until the California Supreme

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1. We concluded that AEDPA's statute of limitations could not commence running before the effective date of AEDPA, lest prisoners find themselves to be already barred by a limitation on the date it was enacted. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999).

2. We review de novo the district court's dismissal of Saffold's petition on the ground that he has failed to satisfy the statute of limitations. *Miles*, 187 F.3d at 1105.

Court denied his habeas petition.

The Superior Court denied Saffold's state habeas petition on June 9, 1997. Five days thereafter, on June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26, 1997. Saffold then waited four and one-half months before filing an original habeas petition in the California Supreme Court, on November 13, 1997.[3] The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court ruled that the AEDPA limitation was tolled only while each state court had the petition under consideration. Thus, it excluded the gap of four days from the Superior Court's denial of Saffold's petition to his filing of a petition with the state Court of Appeal by delivery to prison authorities. It also excluded the four and one-half months between the denial by the Court of Appeal and Saffold's filing of his petition with the California Supreme Court.[4] By this calculation, Saffold had run over his one-year limitation by nearly five months when he filed his federal petition.

[1] We know now that the district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the

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3. Saffold contends that he did not receive notice of the denial by the Court of Appeal until November 10, 1997.

4. There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. *See Nino*, 183 F.3d at 1006 n.3. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final.

district court issued its order, we decided *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). There we held that:

> the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application."
>
> Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

Id. at 1006 (footnote and citation omitted) (emphasis added). It seems clear, therefore, that time should have continued to be tolled during the brief gap of a few days between the Superior Court's denial of Saffold's habeas petition and his filing of a petition in the Court of Appeal. It is less clear under *Nino*, however, whether limitations should be tolled during the four and one-half months after the Court of Appeal denied relief and before Saffold petitioned the California Supreme Court. Section 2244(d)(2) tolls the AEDPA limitation while a "properly filed" application for habeas is pending in state court. 28 U.S.C. § 2244(d)(2). *Nino* stated, as we have emphasized above, that time was tolled while a petitioner was attempting to exhaust state collateral remedies "'through proper use of state court procedures.'" *Nino*, 183 F.3d at 1006. We then added a footnote to Nino, stating:

> Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because

> the petitioner engaged in substantial delay in asserting habeas claims.

Id. at 1006 n.4.[5]

[2] The California Supreme Court's order denying Saffold relief stated, in its entirety: "Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence."[6] The State contends that this order raises the question that *Nino* left open, but we conclude that the order does not. First and most important, the California Supreme Court did address the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in *Nino* , "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." *Id.* at 1007. We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.

[3] Even if we give separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied "for lack of diligence," we conclude that time should remain tolled because the dismissal for untimeliness at least partially addressed the merits. The order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of

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5. We note that the Supreme Court has granted certiorari in a case that may address this issue left open in *Nino*. *See Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *cert. granted*, No. 99-1238, 2000 WL 122154 (U.S. Apr. 17, 2000).

6. The dissent quotes selectively from these words, *infra*. The fact remains, however, that the California Supreme Court denied Saffold's petition both "*on the merits* and for lack of diligence.

Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.[7] But, in either event, at the time when it denied Saffold's petition partly for "lack of diligence," the California Supreme Court applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at *3-4 (9th Cir. Apr. 24, 2000). Accordingly, such an untimeliness ruling did not constitute an independent state ground of decision. *See id.* at *4. We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation. The untimeliness ruling involves consideration of the federal constitutional claims. As we have already stated, we are reluctant to require the filing of a federal petition before the California Supreme Court has finished its consideration of the merits of the claims. That reluctance continues whether the California Supreme Court is considering the merits directly, or derivatively in the course of determining whether an untimeliness bar should apply.

[4] We conclude, therefore, that the California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.[8] Pursuant to *Nino*, Saffold

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7. We note that at the time Saffold's conviction became final, the California Supreme Court's standards for timeliness for filing petitions for habeas corpus petitions were not consistently applied. *See Morales v. Calderon*, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

8. The dissenting opinion, in its footnote 1, refers to the rule adopted in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999), *aff'd*, 121 S. Ct. 361 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. We have no quarrel with this formulation, but disagree with the dissent that review was "unavailable"

is entitled to exclude from the calculation of the one-year limitation the entire period from the filing of his first state habeas petition in Superior Court until the denial of his habeas petition by the California Supreme Court on May 27, 1998.[9]

THE "MAILBOX" RULE

[5] We reverse, therefore, the judgment of the district court that failed to credit Saffold with this entire time of tolling. We cannot direct the district court to entertain Saffold's petition, however, because there remain other matters in dispute concerning its timeliness. In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. We have said that the same rule would appear to apply to habeas corpus petitions filed under AEDPA. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999) (canvassing cases of other circuits so holding). We now hold that it does, and apply the *Houston* "mailbox" rule not only to the filing of Saffold's federal petition but also, for purposes of calculating the AEDPA

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to Saffold at the time he filed his original habeas petition in the California Supreme Court. The California Supreme Court, in denying that petition, ruled on its merits. In light of that fact, it is impossible for us to conclude that review was "unavailable" in that court. Moreover, the alternative ruling denying the petition for lack of diligence was "'a condition for obtaining relief,'" necessarily ruled upon by the court, not a "'condition to filing.'" *Dictado v. Ducharme*, ____ F.3d ____, ____, 2001 WL 203252 at *3 (9th Cir. Mar. 28, 2001) (quoting *Artuz v. Bennett*, 121 S. Ct. 361, 365 (2000)). Such procedural bars to the obtaining of relief do not prevent a petition from being "properly filed," *see id.*, and review from therefore being "available" even if unsuccessful.

9. Our conclusion that Saffold is entitled to tolling for this entire period makes it unnecessary for us to address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal.

limitation period, to the filing of Saffold's petition to state court that began the period of tolling. At both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court. *See Houston v. Lack*, 487 U.S. 270-72.

[6] The district court assumed, as we have, without deciding, that Saffold delivered his first state petition to prison authorities for mailing on April 17, 1997. The State disputes that point and, because the initial petition was not stamped "filed" in Superior Court until May 1, 1997, it will be necessary for the district court to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time. If Saffold delivered the petition to prison authorities on or before April 23, 1997, it will still be crucial to ascertain exactly when he did so, in order to determine the number of days Saffold had remaining in his one-year limitation period. The number of days remaining may turn out to be less than the number of days between the denial of Saffold's habeas petition by the California Supreme Court on May 27, 1998, and the date Saffold filed his petition in federal court. If so, Saffold's petition would be untimely. To determine this latter issue, the district court may have to address Saffold's contention that he delivered his federal petition, which was filed on June 4, 1998, to prison officials on June 2, 1998. We leave these matters to the district court on remand.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the majority's interpretation of *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), I must respectfully dissent from its application of the federal statute of limitations to state habeas relief and the court's judgment that the district court erred in denying the federal petition.

I

Even if we assume that the majority's newly announced adoption of the "mailbox" rule is appropriate, many additional difficulties persist in its interpretation of *Nino*. Saffold contends, and the majority agrees, that the statute of limitations should be deemed tolled for the entire process of state collateral challenge. I cannot agree. In a case involving such dilatory behavior as this, the tripartite process cannot be treated as one solid block of tolled time; rather, the clock must continue to run in the periods of excessive delay between the three separate habeas petitions.

In *Nino*, this court held that "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.* at 1006. While at a superficial level, this statement may appear to lend support to the majority's argument that the interstitial periods between Saffold's state petitions are irrelevant, a more careful analysis of that precedent exposes the flaws in the majority's interpretation.

After setting out that general pronouncement, the court in *Nino* was careful to mention that "it express[ed] no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* at 1006 n.4. When Saffold waited

four months from the date that his petition to the California Court of Appeal was denied until the date that he handed his California Supreme Court petition to prison officials, he was not "properly pursuing" his appeal. Indeed, the California Supreme Court's dismissal "for lack of diligence" is just the sort of thing that the panel in *Nino* was exempting when it declined to toll "substantial delay[s] in asserting habeas claims."[1/]

Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals. The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." 183 F.3d at 1006 n.4. *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas

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1. My reading of *Nino* is consistent with the approach taken to the 28 U.S.C. § 2244(d)(2) "pending" requirement by the Second Circuit in *Artuz v. Bennett*, 199 F.3d 116 (2d Cir. 1999). In *Bennett*, the Second Circuit held that "a state-court petition is 'pending' from the time it is first filed until finally disposed *of and further appellate review is unavailable under the particular state's procedures." Bennett*, 199 F.3d at 120 (emphasis added), *aff'd on other grounds, Artuz v. Bennett*, 121 S.Ct. 361 (2000). In this case, review by the California Supreme Court of Saffold's petition was unavailable due to, as the California Supreme Court itself said, Saffold's "lack of diligence" in pursuing that review. Thus, Saffold's petition was not "pending" under § 2244(d)(2) while he waited for several months to decide whether to seek California Supreme Court review.

It is utterly irrelevant that, as the majority notes in footnote 8, Saffold's procedural default was with regard to a "condition for obtaining relief" rather than with regard to a "condition to filing." The fact that the procedural bar was not with regard to a "condition to filing" simply means that Saffold's petition was "properly filed" under § 2244(d)(2). *Artuz v. Bennett*, 121 S.Ct. 361, 365 (2000). By contrast, the question before us in this case, unlike the question before either the Supreme Court in *Bennett*, or this court in *Dictado v. Ducharme*, ____ F.3d ____, ____ 2001 WL 293252 (9th Cir. Mar. 28, 2001), is whether Saffold's petition was "pending" under § 2244(d)(2), not whether it was "properly filed."

petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* Under the California court rule governing the "strongly preferred" method of appeal, *id.* at 1006 n.3, Saffold had ten days in which to file his petition for review to the California Supreme Court after the Court of Appeal's decision became final. Cal. Rules of Court, rule 28(b). He waited several months; and when he did eventually file his petition, it was dismissed "for lack of diligence." Under any method of review, Saffold's delay falls substantially outside the period that Nino tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

II

The magistrate judge provided specific findings and recommendations on the argument that Saffold should not be held accountable for the four-month delay because during that time he was not made aware that the California Court of Appeal had denied his claim. There was "no state created impediment" to prevent Saffold from having filed his petitions to the California Supreme Court and to the United States District Court in a timely fashion, regardless of the California Court of Appeal's ruling. Furthermore, neither the prison nor the

California Court of Appeal did anything to prevent Saffold from receiving notice of the decision.

There simply is no authority for the proposition that Saffold is entitled to relief for not receiving prompt notice of the denials by the various California state courts. Saffold surely could have inquired about the status of his petition once during those four months. He knew that he could ascertain the status of his petition by contacting the court, as he had done so before,[2] and by choosing to wait so long, he ran the risk of seeing his one-year period evaporate.

III

Equitable tolling does not apply to Saffold because this court has applied that doctrine "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *See, e.g., Miles* , 187 F.3d at 1107 (quoting *Calderon (Kelly)*, 163 F.3d at 541) (internal quotation marks omitted). The Supreme Court echoed this sentiment, ruling out equitable tolling for "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Here, the magistrate judge properly rejected petitioner's delayed notice argument, finding no authority "for the proposition that a court document is not effective until a prisoner receives notice of it."

IV

The court in *Nino* specifically carved out an exception to the language upon which the majority rests its decision. That exception clearly dictates that Saffold's dilatory petitions fall

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2. Previously, Saffold wrote to the San Joaquin County Superior Court to determine the status of his petition even before the court had ruled on it.

outside the scope of properly pursued state post-conviction appeals. The district court properly dismissed the petition. I therefore dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD, Petitioner-Appellant,	)	No. 99-15541
	)	D.C. No.
v.	)	CV-98-01040-DFL
ANTHONY NEWLAND Respondent-Appellee.	)	**OPINION**

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
February 14, 2000--San Francisco, California

Filed July 17, 2000

Before: Betty B. Fletcher, William C. Canby, Jr., and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Canby;
Dissent by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness at least partially addresses the merits, time should be tolled for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations.

Tony Saffold was found guilty in California state court of murder, assault with a firearm, and robbery. His conviction became final on April 20, 1992.

AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled.

AEDPA's tolling provision states that the time during which a properly filed application for State post-conviction or other collateral review is pending shall not be counted toward any period of limitation.

Saffold filed his state habeas application in state superior court by delivering the petition to prison authorities on April 17, 1997 – six days before the AEDPA one-year limitation would have expired.

The court denied Saffold's state habeas petition on June 9, 1997. On June 14, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26. Saffold then waited four and one-half months before he filed an original habeas petition in the California Supreme Court, on November 13. The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court, ruling that the AEDPA limitation was tolled only while each state court had the petition under consideration, excluded the four days from the superior court's denial of Saffold's petition to his petition to the state court of appeal by delivery to prison authorities, and the four and one-half months between the denial by the court of appeal and Saffold's petition to the California Supreme Court. By this calculation, Saffold's federal petition was filed nearly five months over the one-year limitation.

Saffold appealed.

[1] The district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, the Ninth Circuit decided in another case how the tolling period for exhaustion of state remedies is to be determined. The Ninth Circuit held that the AEDPA statute of limitations is tolled for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. Applying these principles to California's post-conviction procedure, the Ninth Circuit held that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

[2] The California Supreme Court addressed the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. Tolling AEDPA's statue of limitations until the state has fully completed its review reinforces comity and respect between judicial systems.

[3] Even if giving separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied for lack of diligence, time should have remained tolled because the dismissal for untimeliness at least partially addressed the merits. [4] The California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997.

[5] Habeas corpus petitions filed under AEDPA are deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. [6] On remand, the district court would have to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run at that time.

Judge O'Scannlain dissented, writing that the clock should have continued to run in the periods of Saffold's excessive delay between the three habeas petitions.

COUNSEL

Mary Katherine McComb, Davis, California, for the petitioner-appellant.

Stan Cross, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Tony Eugene Saffold is a state prisoner appealing the district court's dismissal of his federal petition for habeas corpus. The district court concluded that Saffold had failed to satisfy the one-year statute of limitations for a state prisoner filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). Whether or not Saffold's petition is barred by the statute of limitations turns in part on a calculation of the period during which the federal statute was tolled while Saffold's petitions for state habeas relief were "pending" in the California courts. *See* 28 U.S.C. § 2244(d)(2). After the district court issued its order, we decided in another case how the tolling period for exhaustion of state remedies is to be determined. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). We now apply *Nino* and conclude that the district court erred by failing to toll the federal statute of limitations for the entire period during which Saffold pursued state habeas relief.

We also conclude that the "mailbox" rule for pro se prisoners applies to Saffold's petitions to the California court and the federal court for purposes of calculating tolling time under AEDPA. Whether and when Saffold delivered his petitions to prison authorities is unresolved. We therefore reverse the judgment of the district court and remand for further proceedings.

THE STATUTE OF LIMITATIONS

In 1990, Saffold was found guilty in California state court of murder, assault with a firearm, and two counts of robbery. He appealed, and his conviction became final on direct review on April 20, 1992.

Effective April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA imposed, for the first time, a one-year statute of limitations for state prisoners filing federal petitions for habeas corpus. For prisoners like Saffold, whose convictions had become final before passage of AEDPA, the one-year limitations period began running on AEDPA's effective date, April 24, 1996, and expired on April 23, 1997, unless it was tolled. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).[1]

AEDPA's tolling provision states that "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2).

Saffold contends that he got in under the wire by filing his state habeas application in the Superior Court of San Joaquin County by delivering the petition to prison authorities on April 17, 1997--just six days before the AEDPA one-year limitation would have expired. The district court accepted that contention for purposes of decision and, in order to review the district court's ruling, we accept it as well.

The issue for our decision is how much of the time after April 17, 1997, was tolled for purposes of AEDPA.[2] We

1. We concluded that AEDPA's statute of limitations could not commence running before the effective date of AEDPA, lest prisoners find themselves to be already barred by a limitation on the date it was enacted. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1286-87 (9th Cir. 1997), *overruled on other grounds* by *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 119 S. Ct. 1377 (1999).

2. We review de novo the district court's dismissal of Saffold's petition on the ground that he has failed to satisfy the statute of limitations. *Miles*, 187 F.3d at 1105.

conclude that Saffold had a state collateral proceeding"pending" within the meaning of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), during the entire period from the time he filed his state petition in the trial court until the California Supreme Court denied his habeas petition.

The Superior Court denied Saffold's state habeas petition on June 9, 1997. Five days thereafter, on June 14, 1997, Saffold delivered to prison authorities his habeas petition to the California Court of Appeal. The Court of Appeal denied that petition on June 26, 1997. Saffold then waited four and one-half months before filing an original habeas petition in the California Supreme Court, on November 13, 1997.[3] The California Supreme Court denied the petition "on the merits and for lack of diligence" on May 27, 1998.

The district court ruled that the AEDPA limitation was tolled only while each state court had the petition under consideration. Thus, it excluded the gap of four days from the Superior Court's denial of Saffold's petition to his filing of a petition with the state Court of Appeal by delivery to prison authorities. It also excluded the four and one-half months between the denial by the Court of Appeal and Saffold's filing of his petition with the California Supreme Court.[4] By this calculation, Saffold had run over his one-year limitation by nearly five months when he filed his federal petition.

3. Saffold contends that he did not receive notice of the denial by the Court of Appeal until November 10, 1997.

4. There are two methods by which a petitioner may seek review by the California Supreme Court after a habeas petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original petition in the California Supreme Court. *See Nino*, 183 F.3d at 1006 n.3. Saffold filed an original petition. He therefore was not governed by California's Rule of Court 28(b), upon which the dissent relies, that requires a petition for review to be filed within ten days after the Court of Appeal's decision became final.

[1] We know now that the district court erred in ruling that time ran for AEDPA purposes during all times when a petition was not actually under consideration in a state court. After the district court issued its order, we decided *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, No. 99-899, 2000 WL 507534 (U.S. May 1, 2000). There we held that:

> the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application."
>
> Applying these principles to California's post-conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge.

Id. at 1006 (footnote and citation omitted) (emphasis added). It seems clear, therefore, that time should have continued to be tolled during the brief gap of a few days between the Superior Court's denial of Saffold's habeas petition and his filing of a petition in the Court of Appeal. It is less clear under *Nino*, however, whether limitations should be tolled during the four and one-half months after the Court of Appeal denied relief and before Saffold petitioned the California Supreme Court. Section 2244(d)(2) tolls the AEDPA limitation while a "properly filed" application for habeas is pending in state court. 28 U.S.C. § 2244(d)(2). *Nino* stated, as we have emphasized above, that time was tolled while a petitioner was attempting to exhaust state collateral remedies "'through proper use of state court procedures.'" *Nino*, 183 F.3d at 1006. We then added a footnote to Nino, stating:

> Because it is not at issue in this case, we express no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims.

Id. at 1006 n.4.[5]

[2] The California Supreme Court's order denying Saffold relief stated, in its entirety: "Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence." The State contends that this order raises the question that *Nino* left open, but we conclude that the order does not. First and most important, the California Supreme Court did address the merits of Saffold's claim. The whole purpose of the tolling requirement is to permit state courts to address the merits of the petitioner's claim. As we observed in Nino , "[t]olling AEDPA's statute of limitations until the state has fully completed its review reinforces comity and respect between our respective judicial systems." *Id.* at 1007. We therefore decline to adopt a rule that would require Saffold to have filed his federal petition before the California Supreme Court ruled on the merits of his claim.

[3] Even if we give separate consideration to the California Supreme Court's alternative ruling that Saffold's petition was denied "for lack of diligence," we conclude that time should remain tolled because the dismissal for untimeliness at least partially addressed the merits. The order wholly fails to specify, either by additional explanation or citation to authority, whether the delay to which it refers is the four and one-half months from the decision of the Court of

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5. We note that the Supreme Court has granted certiorari in a case that may address this issue left open in *Nino*. *See Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *cert. granted*, No. 99-1238, 2000 WL 122154 (U.S. Apr. 17, 2000).

Appeal to the filing of Saffold's petition in the California Supreme Court, or the five years from the finality of Saffold's conviction to his first habeas petition.[6] But, in either event, at the time when it denied Saffold's petition partly for "lack of diligence," the California Supreme Court applied its untimeliness bar only after considering to some degree the underlying federal constitutional questions raised. *See La Crosse v. Kernan*, No. 97-55085, 2000 WL 432414, at *3-4 (9th Cir. Apr. 24, 2000). Accordingly, such an untimeliness ruling did not constitute an independent state ground of decision. *See id.* at *4. We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation. The untimeliness ruling involves consideration of the federal constitutional claims. As we have already stated, we are reluctant to require the filing of a federal petition before the California Supreme Court has finished its consideration of the merits of the claims. That reluctance continues whether the California Supreme Court is considering the merits directly, or derivatively in the course of determining whether an untimeliness bar should apply.

[4] We conclude, therefore, that the California Supreme Court's denial of Saffold's petition on the alternative ground of "lack of diligence" did not cause an interruption of the tolling period that began on June 17, 1997. Pursuant to *Nino*, Saffold is entitled to exclude from the calculation of the one-year limitation the entire period from the filing of his first state habeas petition in Superior Court until the denial of his habeas petition by the California Supreme Court on May 27, 1998.[7]

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6. We note that at the time Saffold's conviction became final, the California Supreme Court's standards for timeliness for filing petitions for habeas corpus petitions were not consistently applied. *See Morales v. Calderon*, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

7. Our conclusion that Saffold is entitled to tolling for this entire period makes it unnecessary for us to address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal.

THE "MAILBOX" RULE

[5] We reverse, therefore, the judgment of the district court that failed to credit Saffold with this entire time of tolling. We cannot direct the district court to entertain Saffold's petition, however, because there remain other matters in dispute concerning its timeliness. In *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Supreme Court held that a notice of appeal by a pro se prisoner is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. We have said that the same rule would appear to apply to habeas corpus petitions filed under AEDPA. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999) (canvassing cases of other circuits so holding). We now hold that it does, and apply the *Houston* "mailbox" rule not only to the filing of Saffold's federal petition but also, for purposes of calculating the AEDPA limitation period, to the filing of Saffold's petition to state court that began the period of tolling. At both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court. *See Houston v. Lack*, 487 U.S. 270-72.

[6] The district court assumed, as we have, without deciding, that Saffold delivered his first state petition to prison authorities for mailing on April 17, 1997. The State disputes that point and, because the initial petition was not stamped "filed" in Superior Court until May 1, 1997, it will be necessary for the district court to determine when Saffold's petition was delivered to prison authorities in order to decide whether the limitation period that expired on April 23, 1997, had already run

at that time. If Saffold delivered the petition to prison authorities on or before April 23, 1997, it will still be crucial to ascertain exactly when he did so, in order to determine the number of days Saffold had remaining in his one-year limitation period. The number of days remaining may turn out to be less than the number of days between the denial of Saffold's habeas petition by the California Supreme Court on May 27, 1998, and the date Saffold filed his petition in federal court. If so, Saffold's petition would be untimely. To determine this latter issue, the district court may have to address Saffold's contention that he delivered his federal petition, which was filed on June 4, 1998, to prison officials on June 2, 1998. We leave these matters to the district court on remand.

REVERSED and REMANDED.

O'SCANNLAIN, Circuit Judge, dissenting:

Because I disagree with the majority's interpretation of *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), I must respectfully dissent from its application of the federal statute of limitations to state habeas relief and the court's judgment that the district court erred in denying the federal petition.

I

Even if we assume that the majority's newly announced adoption of the "mailbox" rule is appropriate, many additional difficulties persist in its interpretation of *Nino*. Saffold contends, and the majority agrees, that the statute of limitations should be deemed tolled for the entire process of state collateral challenge. I cannot agree. In a case involving such dilatory behavior as this, the tripartite process cannot be treated as one solid block of tolled time; rather, the clock must continue to run in the periods of excessive delay between the three separate

habeas petitions.

In *Nino*, this court held that "the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.* at 1006. While at a superficial level, this statement may appear to lend support to the majority's argument that the interstitial periods between Saffold's state petitions are irrelevant, a more careful analysis of that precedent exposes the flaws in the majority's interpretation.

After setting out that general pronouncement, the court in *Nino* was careful to mention that "it express[ed] no opinion as to whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* at 1006 n.4. When Saffold waited four months from the date that his petition to the California Court of Appeal was denied until the date that he handed his California Supreme Court petition to prison officials, he was not "properly pursuing" his appeal. Indeed, the California Supreme Court's dismissal "for lack of diligence" is just the sort of thing that the panel in *Nino* was exempting when it declined to toll "substantial delay[s] in asserting habeas claims."

Unlike the petitioner in *Nino*, who pursued his state claims diligently through all three avenues of potential relief, Saffold left a glaring gap between two of his collateral appeals. The language of *Nino* expressly contemplated the possibility that the clock could run during periods in which the petitioner was "not properly pursuing his state post-conviction remedies." 183 F.3d at 1006 n.4. *Nino* exempts from its holding instances in which "the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* Under the California court rule governing the "strongly preferred" method

of appeal, id. at 1006 n.3, Saffold had ten days in which to file his petition for review to the California Supreme Court after the Court of Appeal's decision became final. Cal. Rules of Court, rule 28(b). He waited several months; and when he did eventually file his petition, it was dismissed "for lack of diligence." Under any method of review, Saffold's delay falls substantially outside the period that Nino tolls for "properly pursu[ed]" state post-conviction remedies. 183 F.3d 1006. The majority ignores the California Supreme Court's dismissal, stating that it should have justified its decision by providing "additional explanation or citation to authority." Maj. Op. at 6523. I cannot participate in the majority's attempt to tell the California Supreme Court how to deal with dilatory petitions. Saffold had obviously dallied months longer than the time allotted under California rules. Regrettably, the majority presumptuously and inappropriately purports to trump the procedural rules of the highest court of a sovereign state. By overlooking Saffold's delay in this case, the majority eviscerates the language in the fourth footnote of the *Nino* decision. What, if not a case such as this, pray tell, would satisfy the majority that a petitioner had violated *Nino*?

II

The magistrate judge provided specific findings and recommendations on the argument that Saffold should not be held accountable for the four-month delay because during that time he was not made aware that the California Court of Appeal had denied his claim. There was "no state created impediment" to prevent Saffold from having filed his petitions to the California Supreme Court and to the United States District Court in a timely fashion, regardless of the California Court of Appeal's ruling. Furthermore, neither the prison nor the California Court of Appeal did anything to prevent Saffold from receiving notice of the decision.

There simply is no authority for the proposition that Saffold is entitled to relief for not receiving prompt notice of the denials by the various California state courts. Saffold surely could have inquired about the status of his petition once during those four months. He knew that he could ascertain the status of his petition by contacting the court, as he had done so before,[1] and by choosing to wait so long, he ran the risk of seeing his one-year period evaporate.

III

Equitable tolling does not apply to Saffold because this court has applied that doctrine "only if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *See, e.g., Miles* , 187 F.3d at 1107 (quoting *Calderon (Kelly)*, 163 F.3d at 541) (internal quotation marks omitted). The Supreme Court echoed this sentiment, ruling out equitable tolling for "what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Here, the magistrate judge properly rejected petitioner's delayed notice argument, finding no authority "for the proposition that a court document is not effective until a prisoner receives notice of it."

IV

The court in *Nino* specifically carved out an exception to the language upon which the majority rests its decision. That exception clearly dictates that Saffold's dilatory petitions fall outside the scope of properly pursued state post-conviction appeals. The district court properly dismissed the petition. I therefore dissent.

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1. Previously, Saffold wrote to the San Joaquin County Superior Court to determine the status of his petition even before the court had ruled on it.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY EUGENE SAFFOLD,	)	
	)	No. 99-15541
Petitioner-Appellant,	)	DC No. CV-98-01040
	)	DFL
v.	)	
	)	
ANTHONY NEWLAND,	)	**ORDER**
	)	
Respondent-Appellee.	)	FILED: June 4, 2001
_____	)	

CANBY, Circuit Judge

The motion of the respondent-appellee for a stay of mandate is GRANTED. The mandate of this court is stayed for 90 days from May 23, 2001, the date of denial of the respondent's petition for panel and en banc rehearing. If, within that time, a petition for certiorari is filed with the Clerk of the Supreme Court of the United States, then the mandate shall be further stayed until final disposition of the petition by the Supreme Court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

No. CIV S-98-1040 DFL JFM P

vs.

ANTHONY NEWLAND,

Respondent.

ORDER

FILED: Feb. 25, 1999

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Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's January 6, 1999 order which granted respondent's August 28, 1998 motion to dismiss. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

Petitioner has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant petition: whether petitioner's application is barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1).

Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is issued in the present action.

DATED: February 24, 1999.

s/ David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

vs.

No. CIV S-98-1040
DFL JFM P

ANTHONY NEWLAND,

Respondent.

ORDER

FILED: Jan. 6, 1999

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On November 3, 1998, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed November 3, 1998, are adopted in full;

2. Respondent's August 28, 1998 motion to dismiss is granted; and

3. This action is dismissed.

DATED: January 5, 1999

s/ David F. Levi
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

vs.

ANTHONY NEWLAND,

Respondent.

_____/

No. CIV S-98-1040
DFL JFM P

FINDINGS & RECOMMENDATIONS

FILED: Nov. 3, 1998

Petitioner, a state prisoner proceeding pro se and in forma pauperis, filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 4, 1998. This matter is before the court on respondent's September 21, 1998 motion to dismiss.

Respondent contends that the petition is barred by the statute of limitations and is not exhausted. Petitioner argues that the petition is timely and/or that the statute of limitations period should be equitably tolled. He concedes that his petition contains an unexhausted claim, but requests that the court dismiss that claim and proceed with the remainder of the petition.

I. Statute of Limitations

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. The AEDPA amended 28 U.S.C. § 2244(d)(1) so that it now provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(2) provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d). The statute of limitations was enacted on April 24, 1996, and the one year time limit began to run on that date against state prisoners whose convictions had become final on or before that date. Calderon v. U.S. Dist. Court for Central Dist. of Cal. (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997). The Ninth Circuit has held that § 2244(d) is a statute of limitations subject to equitable tolling. Id. at 1285.

II. Analysis

A. Limitations Period

For purposes of the statute of limitations analysis, the relevant chronology of this case is as follows. On April 3, 1990, petitioner was found guilty after a jury trial. On July 6,1990, petitioner filed a notice of appeal. On January 27, 1992, the California Court of Appeal filed an opinion in which it stayed part of petitioner's sentence and affirmed the judgment as modified. On March 4, 1992, petitioner filed a petition for review with the California Supreme Court. On April 15, 1992, the California Supreme Court denied the petition for review. On April 20, 1992, the California Court of Appeal certified that the January 27, 1992 opinion had become final. The statute of limitations began to run on April 24, 1996, the date of enactment of the AEDPA, since petitioner's conviction had become final before that date. Calderon, 128 F. 3d at 1286. Petitioner did not file any documents in the California courts before the statute of limitations expired on April 24, 1997.

On May 1, 1997, petitioner filed a petition for writ of habeas corpus with the San Joaquin County Superior Court. This petition was denied on June 9, 1997. On June 18, 1997, petitioner filed a petition for writ of habeas corpus with the California Court of Appeal. The petition was denied on June 26, 1997. On November 13, 1997, petitioner filed a petition for writ of habeas corpus with the California Supreme Court. The petition was denied on May 27, 1998. On June 4, 1998, petitioner filed the instant application for a writ of habeas corpus.

Because petitioner's May 1, 1997, June 18, 1997, and November 13, 1997 petitions were filed after the statute of limitations had expired, they do not operate to toll the statute. Petitioner argues, however, that the application of the limitations period must be delayed because of state action which prevented him from filing a timely application and because petitioner only recently discovered the factual predicate of one of the claims presented.

B. Mailbox Rule

Petitioner contends that the statute of limitations should be equitably tolled because of the mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the date of its receipt by the court clerk). He has filed two declarations in this court in which he sets forth the dates on which he gave his petitions to prison guards for filing in the California courts and in this court. The dates do not match, but neither set of dates will avoid the statute of limitations. In his declaration under penalty of perjury filed in support of the petition for writ of habeas corpus in this court, petitioner represents that he gave his petition for writ of habeas corpus to prison authorities for filing in the California Superior Court on April 17, 1997, in the California Court of Appeal on June 15, 1997, in the California Supreme Court on November 10, 1997, and in this court on June 2, 1998.

In his opposition to the instant motion, petitioner declares under penalty of perjury that he gave his petition for writ of habeas corpus to prison authorities for filing in the California Court of Appeal on June 14, 1997 and in this court on May 27, 1998. The second set of dates is somewhat suspect since the petition for writ of habeas corpus filed in this court was signed by petitioner on June 2, 1998, six days after he declared under penalty of perjury he gave it to prison authorities for mailing. Petitioner is advised that the filing of false information with this court may lead to civil and criminal sanctions. In the interest of timely resolution of this motion, however, the court will analyze the problem under both sets of dates.

Assuming *arguendo* the accuracy of the first declaration, the statute of limitations began to run against petitioner on April 24, 1996. Petitioner filed his petition for writ of habeas corpus in the California Superior Court on April 17, 1997, three hundred fifty eight days after the statute began to run. This tolled the statute of limitations. 28 U.S.C. § 2244(d)(2). The

petition was denied on June 9, 1997. The statute of limitations began to run again on June 10, 1997. At this time petitioner had seven days left to file his petition. Petitioner filed his petition with the California Court of Appeal on June 14, 1997, or four days later. He then had three days left to file his petition. The statute was tolled until the petition was denied on June 26, 1997. The statute began to run again on June 27, 1997. Petitioner filed his petition with the California Supreme Court on November 10, 1997, more than four months after the statute resumed running. If these dates are accurate the petition was untimely.[1/]

Assuming *arguendo* the accuracy of the second declaration, the statute of limitations also began to run against petitioner on April 24, 1996. Petitioner filed his petition for writ of habeas corpus in the California Superior Court on April 17, 1997, three hundred fifty eight days after the statute began to run. This tolled the statute of limitations. 28 U.S.C.§ 2244(d)(2). The petition was denied on June 9, 1997. The statute of limitations began to run again on June 10, 1997. At this time petitioner had seven days left to file his petition. Petitioner filed his petition with the California Court of Appeal

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1. Petitioner contends that the Court of Appeals denied his petition on November 10, 1997, because that is when he allegedly received notice of the denial. Petitioner cites no authority for the proposition that a court document is not effective until a prisoner receives notice of it, and this court declines to so hold. Further, if petitioner wished to ascertain the status of his petition with the Court of Appeal, he could have corresponded with that court, as he did in November.

Even if the Court of Appeals had denied the petition on November 10, 1997, and petitioner had filed his petition with the California Supreme Court on that date, his petition to this court would still be untimely. The petition to the California Supreme Court was denied on May 27, 1998. The statute began to run again on May 28, 1998. Petitioner would then have had three days left to file his petition in this court. Pursuant to the "mailbox rule," petitioner filed the instant application on June 2, 1998, which is five days later, or two days too late.

on June 14, 1997, or four days later. He then had three days left to file his petition. The statute was tolled until the petition was denied on June 26, 1997. The statute began to run again on June 27, 1997. Petitioner filed his petition with the California Supreme Court on November 10, 1997, more than four months after the statute resumed running. Using these dates the petition again was untimely.

C. Improper State Action

Petitioner claims that the one year period of limitation should not have begun to run until November 10, 1997, because the state created an impediment to timely filing of his application. See 28 U.S.C. § 2244(d)(1)(B). Petitioner states that although his petition to the California Court of Appeal was denied on June 26, 1997, he was not put on notice of the denial until November 10, 1997, when he wrote to the California Court of Appeal asking for information about the status of his petition. Petitioner surmises that he failed to receive earlier notice of the denial because of "State action by either the Appellate Court's failure to notify Petitioner that the petition had been denied, or the prison's failure to issue Petitioner his legal mail." (Response at 5.) He contends that the failure to receive notification of the denial constitutes illegal state action preventing the filing of an earlier petition both in the California Supreme Court and in this court. Even assuming that petitioner did not receive notice of the denial of his petition for writ of habeas corpus to the California Court of Appeal until November 10, 1997, this would not make his petition timely. There was no state created impediment to filing his earlier applications to the California courts on April 17, 1997 and June 15, 1997. Accordingly, the statute had already started to run at the time of petitioner's receipt of the decision of the Court of Appeals. As discussed above, even if petitioner was unable to file his subsequent petition until November 10, 1997 because of some improper state action, the petition would still be untimely.

Further, the vague claim made by petitioner that someone must have prevented him from receiving notice of the decision does not constitute "unconstitutional state action." There is no evidence that either the Court of Appeal or prison authorities failed to obey the constitution in this regard. See, eg., Miller v. Marr, 141 F. 3d 976, 978 (10th Cir. 1998), cent. denied ____ S.Ct. ____, 1998 WL 407280 (U.S. Oct. 5, 1998) (not enough to say, without elaboration, that prison library lacked relevant statutes and case law or that the procedure to request specific materials was inadequate) Hullum v. Maloney, 14 F. Supp. 2d 164 (D. Mass.1998) (same). Petitioner's claim lacks merit.

D. Discovery of Factual Predicate of Claims

Petitioner claims that the one year period of limitation should not begin to run until February 1997 because he could not have discovered the factual predicate of one of his claims prior to that time. See 28 U.S.C. § 2244(d)(1)(D).[2] If petitioner is correct, then his petition would be timely.

One of petitioner's claims is that his trial counsel was ineffective because he failed to introduce preliminary hearing testimony to the effect that the victim's wife had identified two other men in a photo lineup as the possible perpetrators of her husband's murder. He argues that this evidence was necessary in order to impeach the testimony of the victim's wife.[3] (Petition at 18 - 19.) Petitioner states that it was not until his family hired a private investigator in February 1997 to poll the jurors at his trial that he discovered that this information might

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2. In another part of the opposition, petitioner alleges that the factual predicate of his 26 ineffective assistance of counsel claim was discovered on May 8, 1997. (Opposition at 12.)

3. The victim's wife also identified petitioner as the perpetrator from a photo lineup.

have influenced the verdict of several jurors. He states that, until this time, he was not aware that he could satisfy the "prejudice" prong of this particular claim.

Petitioner's claim must fail. He was aware during his trial that the victim's wife had not been impeached with the preliminary hearing testimony. He was therefore aware of the "factual predicate" of this claim at that time and could have raised it then. Although petitioner states that it was not until he received the juror statements that he was aware that counsel's omission may have actually influenced the jury, this evidence did not establish a factual predicate for his claim but only possible evidence in support thereof. Section 2244(d)(1)(D) runs from the date a petitioner is on notice of the facts which would support a claim, not from the date on which he has in his possession evidence to support his claim. See, e.g., Flanagan v. Johnson, 154 F. 3d 196, 198 (5th Cir. 1998) ("[Petitioner] is confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim. . . Section 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim"); Youngblood v. Greiner, 1998 WL 720681 (S.D.N.Y. 1998) (receipt of evidence in support of petitioner's claim would not toll the statute where facts underlying the claim were known earlier). The court also notes that petitioner argues in his petition to this court that no showing of prejudice is required as to this claim. (See Petition at 19, 29.)

The court also concludes that petitioner has not made a showing that he exercised due diligence in obtaining the juror information. He states that he had "no way of knowing how to contact the jurors" but that his family was "finally able to hire a private investigator." Other than these excuses as to his inaction, he has made no showing of an effort to learn this information earlier. Finally, the court notes that petitioner has raised numerous other claims in his petition. There is no evidence that those claims were unknown at an earlier date.

Petitioner's claim that the statute of limitations did not begin to run until February 1997, is without merit.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's August 28, 1998 motion to dismiss be granted and this case be closed.[4]

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: October 30, 1998.

s/ John F. Moulds
UNITED STATES MAGISTRATE JUDGE

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4. In light of this disposition, the court need not rule on respondent's claim that the petition is not exhausted or on petitioner's request that the court proceed only on the exhausted claims.

APPENDIX G

S065746

IN THE SUPREME COURT OF CALIFORNIA

IN RE TONY EUGENE SAFFOLD

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED on the merits and for lack of diligence.

FILED: May 27, 1998

s/ George
Chief Justice